85-978

NO._____

Supreme Court, U.S.
FILED
NOV 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS.

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER, IN FACT, THE EIGHTH CIRCUIT COURT OF APPEALS HAS, BY ORDER OR BY LOCAL RULE, REFUSED TO ALLOW THE THREE (3) ADDITIONAL DAYS PERMITTED BY FRAP 26(c) IN FILING THE PETITION FOR RE-HEARING PERMITTED BY FRAP 40(a)?

II.

WHETHER THE LETTER FROM MICHAEL E. GANS, CHIEF DEPUTY CLERK, DATED AUGUST 15, 1985, TRANSMITTING UNSIGNED ORDER, CONSTITUTES FINAL JUDGMENT OF THE EIGHTH CIRCUIT COURT OF APPEALS, FROM WHICH DATE THE NINETY-DAY TIME PERIOD WOULD START TO RUN, PURSUANT TO TITLE 28, U.S.C., SECTION 2101(c), WITHIN WHICH TO PETITION THE UNITED STATES SUPREME COURT FOR A WRIT OF

CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS?

III.

IN THE EVENT THAT THE UNSIGNED ORDER TRANSMITTED BY MICHAEL E. GANS, DATED AUGUST 15, 1985, IS DEEMED TO CONSTITUTE FINAL JUDGMENT OF THE EIGHTH CIRCUIT COURT OF APPEALS, WHETHER THE APPELLATE COURT OVERLOOKED OR MIS-APPREHENDED SIGNIFICANT ISSUES OF GRAVE CONSTITUTIONAL DIMENSION, OR RENDERED A JUDGMENT THAT DIRECTLY CONFLICTS WITH PRIOR SUPREME COURT OR EIGHTH CIRCUIT PRECEDENT?

IV.

WHETHER GENUINE ISSUES OF MATERIAL FACTS EXIST WHICH PRECLUDE SUMMARY JUDGMENT IN THIS CIVIL RIGHTS ACTION?

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IN THE
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OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner MOSE KOREY, Pro Se, respectfully prays that a Writ of Certiorari issue to review the Actions of the Clerk of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 15,

1985, and to review subsequent Actions by said Clerk; and to review the Ruling and Order Granting Defendant's Motion for Summary Judgment, entered on April 12, 1985, and Order Denying Motion to Reconsider, entered May 8, 1985, both Orders entered by W. C. Stuart, Chief Judge of the United States District Court for the Southern District of Iowa.

OPINIONS BELOW

The Order of the Eighth Circuit Court of Appeals, allegedly filed on August 15, 1985, but unsigned by any Judge of the Eighth Circuit Court of Appeals, and unsigned by anyone else, by which Petitioner's Appeal from the Judgment of the United States District Court for the Southern District of Iowa was summarily disposed of, which is not

reported, is set out at pp. A-16 to A-18 of the Appendix. The response of the Eighth Circuit Court of Appeals, dated September 19, 1985, but also unsigned by anyone, by which Petitioner's Petition for Rehearing by Panel was denied on the basis of untimely filing, which is not reported, is set out at pp. A-19, A-20 of the Appendix.

The mandate of the Eighth Circuit Court of Appeals, dated August 15, 1985, signed by the Clerk of the Eighth Circuit Court of Appeals, but unsigned by any Judge of the Eighth Circuit Court of Appeals, which is not reported, is set out at pp. A-21 of the Appendix.

The letter Re: Motion to Correct Error, dated October 11, 1985, but unsigned by any Judge of the Eighth

Circuit Court of Appeals, which is not reported, is set out at pp. A-22, A-23 of the Appendix.

The letter Re: No. 85-1669SI Mose Korey v. City of Davenport, Iowa, dated November 6, 1985, which letter ignored Petitioner's Application for Review by the Court, mailed October 18, 1985, but also which letter was unsigned by any Judge of the Eighth Circuit Court of Appeals, which is not reported, is set out at pp. A-24, A-25 of the Appendix.

The Ruling and Order Granting Defendant's Motion for Summary Judgment, of the United States District Court for the Southern District of Iowa (CIVIL NO. 83-174-D-1), entered April 12, 1985, which is not reported, is set out at pp. A-24, A-25 of the Appendix.

The Order Denying Motion to

Reconsider, of the United States District Court for the Southern District of Iowa (CIVIL NO. 83-174-D-1), entered May 8, 1985, which is not reported, is set out at pp. A-12 to A-15 of the Appendix.

JURISDICTION

The jurisdiction of the Supreme Court of the United States on Petitioner's Petition for Writ of Certiorari is invoked pursuant to Title 28, United States Code, Section 2101(c) or 2101(e), as the facts are deemed appropriate, and Supreme Court Rules 17.1(a) and 17.1(c) or 18, as the facts are deemed appropriate.

The jurisdiction of the Supreme Court of the United States on Petitioner's Application to Circuit Justice Blackmun for Extension of Time Within Which to File a Petition

for Writ of Certiorari is invoked pursuant to Title 28, U.S.C.,Section 2101(c), and Supreme Court Rules 17, 18, 20.6 and 43.

The Order Extending Time To File Petition for Writ of Certiorari was signed by Associate Justice Harry A. Blackmun, dated November 9, 1985, File No. A-357.

The Order of the United States District Court for the Southern District of Iowa, granting Defendant's Motion for Summary Judgment, was entered on April 12, 1985, and the Order Denying Motion to Reconsider was entered May 8, 1985 (CIVIL NO. 83-174-D-1).

Petitioner is seeking a review of the above Orders by the United States

District Court for the Southern District of Iowa.

Petitioner's Notice of Appeal was filed on May 10, 1985, and Brief for the Appellant was timely filed on July 31, 1985.

The jurisdiction of the Eighth Circuit Court of Appeals was invoked pursuant to Title 28, U.S.C., Sections 1291, 1294 and 1295; Federal Rules of Appellate Procedure, Rules 3 and 4; and the Eighth Circuit Rules of Appellate Procedure, Rule 1.

Petitioner is seeking a review of the following documents sent to him by the Clerk's Office of the Eighth Circuit Court of Appeals, which documents are presented as judgments of the Eighth Circuit Court of Appeals, yet have no signature of any

Judge of the Eighth Circuit Court of Appeals affixed to any document included among them (85-1669-SI):

1. Letter and Order, dated August 15, 1985;
2. Letter and Document, dated September 19, 1985;
3. Letter dated October 3, 1985, transmitting mandate of the Court;
4. Letter Re: Motion to Correct Error, dated October 11, 1985;
5. Letter Re: No. 85-1669SI Mose Korey v. City of Davenport, Iowa, dated November 6, 1985.

The jurisdiction of the United States District Court for the Southern District of Iowa, which was the Court of first instance, in the original Complaint, (CIVIL NO. 83-174-D-1),

filed October 21, 1983, was invoked under Title 28, U.S.C., Section 1343(3) and Title 42, U.S.C., Sections 1982, 1983, 1985, 1986 and 1500(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Because the provisions involved are lengthy, Petitioner herewith gives the citations which are involved, and sets forth their pertinent verbatim texts in the Appendix at the designated pages:

1. Constitution of the United States of America:

   Fifth Amendment, pp.A-68
   Fourteenth Amendment, pp.A-68, A-69

2. Title 42, U.S.C.:

   Section 1500(c), pp.A-69, A-70

   Section 1982, pp. A-70

   Section 1983, pp.A-70, A-71

   Section 1985, pp.A-71, A-72

Section 1986, pp. A-72

Section 5305(a)(2),

pp. A-73

3. Federal Rules of Civil Procedure, Rule 56(e), Notes of Advisory Committee on Rules, 1963 Amendment, pp. A-73 .

STATEMENT OF THE CASE

Petitioner, MOSE KOREY, Pro Se, adult, native born citizen of the United States, who is a member of a minority class of citizens protected by the Civil Rights Act of 1964, as amended, filed a 31-page Complaint against the City of Davenport, Iowa, on October 21, 1983, for alleged illegal and unconstitutional action of Defendant City in connection with various (alleged) condemnations of Petitioner's real

property in a manner which violated Petitioner's Federally protected rights.

Petitioner alleged violations of his Constitutional rights under color of State law, custom and usage; conspiracy to violate his Constitutional rights under color of State law, custom and usage; and failure to protect from conspiracy to violate his Constitutional rights under color of State law, custom and usage.

The jurisdiction of the United States District Court for the Southern District of Iowa, which was the Court of first instance (CIVIL NO. 83-174-D-1), was invoked pursuant to the provisions of Title 28, U.S.C., Section 1343(3), this being a suit at law which is authorized by law, Title 42, U.S.C., Sections 1982, 1983, 1985 and 1986, to

enforce his protected minority rights, under the 5th and 14th Amendments to the Constitution of the United States of America.

Petitioner further requested that the eminent domain proceedings complained of be annulled and set aside on the grounds that:

a. Valid condemnation proceedings had not been initiated:

(1) Petitioner alleged that all valid condemnation proceedings ceased upon the issuance of and service upon Defendant City of a Temporary Restraining Order, dated and served on June 9, 1969. (Cause No. 51298).

(2) Because of the aforesaid Temporary Restraining Order, the Sheriff and alleged Commission acted illegally and in excess of their subject-matter jurisdiction and with-

out color or right to condemn.

(3) Defendant City acted in violation of HUD Rules and Regulations governing the procedures by which recipients of HUD funds were to acquire real property, as found in Title 24, Code of Federal Regulations, and in other Federal law.

(4) That the records of the alleged condemnation proceedings shows evidence of fraud and conspiracy on the part of Defendant City, the Office of the Sheriff of Scott County, Iowa, and other parties unknown, and consequent failure to protect Petitioner from said conspiracy.

(5) That the said record does not show:

(A) Proof of Service of Notice of Condemnation in the same

manner as original notices, as required by the Code of Iowa;

(B) any valid original signature of the Sheriff of Scott County, Iowa, or of his authorized Deputy, on the document which purportedly shows the Appointment of Commissioners;

(C) that either the Sheriff or his Deputy signed a receipt for remittance, or its disposition, if any, from the City for alleged Deposit of Amount of Damages.

(6) That the Sheriff's Certificate, as found in the record of these proceedings complained of, was, through conspiracy, by parties unknown, falsely, illegally and fraudulently prepared and backdated to June 10, 1969, as evidenced by the fact that

the year 1971 was struck through and altered and replaced by the year 1969. The [illegible]ity, illegality and fraudulence of the Sheriff's Certificate is further evidenced by the fact that Petitioner's attorney filed Notice of Appeal on July 1, 1969, and that if the Sheriff's Certificate had been filled out at the time and certified in compliance with Section 472.20 of the Code of Iowa, 1966, it would have been dated subsequent to July 1, 1969, and it would not have had the year 1971 on it to have been struck through and altered to 1969.

Petitioner further alleged that the acts of Defendant City, as shown by the record, amounted to an evasion of the obligations imposed upon it by the provisions of Constitution and

statute, as a condition precedent to its exercise of the power of eminent domain.

Petitioner further alleged that Defendant City should not be allowed to escape the consequences of its illegal, unconstitutional and oppressive acts and violations of Petitioner's civil rights by claiming the Petitioner has had his day in Court, or that the Federal Court should abstain from protecting the rights of a minority citizen under the Civil Rights Act. To concur with such probable claims by Defendant City would be to defeat the entire purpose of the Civil Rights Act, i.e. to give the citizen resort to the Federal Court for a redress of wrongs committed under the guise of state law.

Petitioner stated that the gravamen of Petitioner's complaint is not to allege a common law tort of trespass and conversion. The gravamen is to allege an unlawful taking of Petitioner's property under the guise of authority conferred to Defendant City by the laws of the State of Iowa in violation of statutory due process, by abuse of process, abuse of power, and in violation of a Temporary Restraining Order of the Iowa District Court in Scott County. (Cause No. 51298)(See Appendix pp.A-26 thru A-34).

Petitioner alleged various acts by Defendant City which constituted "takings" without benefit of condemnation proceedings, in further violation of Federally "protected property rights" as a result of the alleged condemnation.

Petitioner further alleged that without judicial redress in the Federal Court, Petitioner would be helpless, and the apparent security of the Constitution and statutes become, so far as he and his property are concerned, a mere pretense without practical meaning or effect.

Thereupon Defendant City did ANSWER the Complaint and assert a number of Affirmative Defenses and prayed that the Complaint be dismissed. Petitioner thereupon submitted Resistance to Defendant City's ANSWER and Prayer for Dismissal. The prayer was not acted upon by the U.S. District Court at that time.

After Interrogatories were submitted and answered both by Petitioner and Defendant,

Defendant City filed a Motion for Summary Judgment on June 18, 1984.

On July 27, 1984, Petitioner filed Resistance to Defendant City's Motion for Summary Judgment, accompanied by Affidavit of Material Facts in Support of Resistance to Defendant's Motion for Summary Judgment, and Memorandum of Points and Authorities, with Exhibits, including Petitioner's Exhibit No.4: Notice to Defendant of Order to Show Cause, filed June 9, 1969 (initiating Petitioner's Cause No. 51298 opposing the prospective Condemnation proceedings), set forth in Appendix at pp. A-26 thru A-29 ; Order for Hearing on Temporary Injunction, filed June 9, 1969, set forth in Appendix at pp. A-30, A-31 ; Order for Temporary Injunction, filed June 9 and June 11,

1969, set forth in Appendix at pp. A-32, A-33 ; Sheriff's Return on Order served June 9, 1969, on Allyn Wiese, City Clerk, filed June 11, 1969, set forth in Appendix at pp. A-34 ; and Defendant's Answer to Interrogatories, No. 2, set forth in Appendix at pp. A-35, A-36 .

Because of health problems, Petitioner had filed Application for Stay on November 30, 1984, in which he stated that he had been hospitalized on November 4, 1984, and was under doctor's care, which Application was not ruled upon at that time.

On April 12, 1985, a Ruling and Order Granting Defendant's Motion for Summary Judgment was entered by W.C. Stuart, Chief Judge, Southern District of Iowa, set forth in Appendix at pp. A-2 thru A-11 .

Petitioner wrote a letter to the Honorable William C. Stuart, dated April 30, 1985, in which he referred to his failing physical condition and enclosed a letter from his personal physician, Dr. John F. Collins, dated April 29, 1985, stating that Petitioner "is unable to proceed with court action at the present time" due to Petitioner's state of health, set forth in Appendix at pp. A-1 .

Judge W.C. Stuart then treated said letter as a Motion to Reconsider and issued Order Denying Motion to Reconsider, entered May 8, 1985, set forth in Appendix at pp. A-12 thru A-15.

Petitioner filed Notice of Appeal on May 10, 1985.

Petitioner's Brief for the Appelant was timely filed on July 31, 1985.

On August 15, 1985, a letter, signed by Michael E. Gans, Chief Deputy Clerk, Eighth Circuit Court of Appeals, transmitting a "copy of an order entered by us today at the direction of the Court" was sent to Petitioner. The enclosed Order was not signed by any Judge of the Eighth Circuit Court of Appeals, nor was it signed, or attested, by anyone. The Order indicated that, pursuant to Eighth Circuit Rule 12(a), the Court was summarily disposing of the Appeal by Affirming the Ruling of the Court below. Of course, there was no opinion rendered, but neither was there any kind of document sent to Petitioner to which any Judge's signature was affixed. The said Order also had the words "Filed August 15, 1985" typed on it.

These facts set up a critical

uncertainty, controversy and dilemma: On the one hand, if the said Order is deemed to be a valid Order, then it must be considered as a final judgment by the Eighth Circuit Court of Appeals and the ninety-day period in which Petitioner can Petition the United States Supreme Court for a Writ of Certiorari to the Eighth Circuit Court of Appeals would then commence to count; on the other hand, Petitioner then prepared and sent a Petition for Rehearing by Panel which was placed in the U.S. mail on August 28, 1985, with a Certificate of Service attached, and which was received and filed by the Clerk of the Appellate Court on August 30, 1985. Since the Federal Rules of Appellate Procedure, Rule 26(c), allow an additional 3 days to the prescribed period, and the Local Rules of the

Eighth Circuit, which Petitioner had asked for and had received, do not say any different, it is Petitioner's position that his Petition for Rehearing by Panel was timely filed pursuant to FRAP Rule 40(a); in which case the ninety-day period would begin to count from the date that the Appellate Court entered a Ruling on Petitioner's Petition for Rehearing by Panel.

However, on September 19, 1985, a letter, signed by Linda L. Penberthy, Senior Deputy Clerk, transmitting a "copy of order entered today at the direction of the Court" was sent to Petitioner. The enclosed document was not titled "Order", nor was it given any title, nor was it signed by any Judge of the Eighth Circuit Court of Appeals, nor was it signed, or attested, by anyone. The document stated

that "appellant's petition for rehearing is denied by the Court on the basis of untimely filing."

Again, there was no opinion rendered by the Judges, but neither was there any kind of document sent to Petitioner to which any Judge's signature was affixed, nor was it indicated in any way that the said document was filed.

On October 7, 1985, Petitioner mailed a Motion to Correct Error, requesting that the extra three days be recognized as acceptable and that a rehearing be docketed and heard by the Court.

On October 11, 1985, a letter was sent to Petitioner, signed by Linda L. Penberthy, Senior Deputy Clerk, in which she repeated her claim that Petitioner's Petition for Rehear-

ing by Panel had not been timely filed, and included the statement "The three-day mailing privilege is not extended to petitions for rehearing, at least by this Circuit." Here again, there was no document presented to Petitioner which was signed by any Judge of the Eighth Circuit Court of Appeals.

Petitioner then mailed Application for Review by the Court on October 18, 1985, on the basis of his being adversely affected by the above mentioned Actions by the Clerk of Court, and which were unaccompanied by any valid signature of a Judge of the Eighth Circuit Court of Appeals.

On November 6, 1985, a letter was sent to Petitioner by Robert St. Vrain, Clerk of Court, in which he stated that Petitioner's case was properly handled by his office, and that the appeal was

officially concluded with the issuance of the Appellate Court's mandate on October 3, 1985. No direct response was made to Petitioner's said Application for Review by the Court. Said letter of November 6, 1985, is set forth in the Appendix on pp. A-24, A-25 .

These facts set up additional critical uncertainty, controversy and dilemma: On the one hand, Petitioner is taking the position that his original Brief for Appellant, filed July 31, 1985, has not been responded to, nor acted upon, by any Judge, therefore there is, as yet, no final judgment from which to start counting 90-days in which to Petition for Writ of Certiorari; on the other hand, if the Judges of the Eighth Circuit Court of Appeals fail and/or refuse to affix

their signatures to any document, and take the position that August 15, 1985 is the proper date of final judgment, then Petitioner is compelled to rely on Supreme Court Rule 18 as the basis for submitting his Petition for Writ of Certiorari because he does not accept the Actions of the Clerk of Court as representing final judgment by the Eighth Circuit Court of Appeals.

So Petitioner is submitting his Petition for Writ of Certiorari pursuant to both Rule 17 and 18, Supreme Court Rules, as the facts are deemed appropriate, so that there will be no question as to whether it is timely filed.

REASONS WHY THE WRIT SHOULD BE GRANTED

The reasons why Petitioner believes that the writ should be granted are organized in what Petitioner believes to be the proper priority of the Questions Presented For Review.

I.

A. CERTIORARI SHOULD BE GRANTED TO REVIEW THE EIGHTH CIRCUIT PRACTICE IN ALLOWING, OR DISALLOWING THE THREE (3) ADDITIONAL DAYS PERMITTED BY FRAP 26(c) IN FILING THE PETITION FOR REHEARING PERMITTED BY FRAP 40(a)

1. Since it is Petitioner's position that his Petition for Rehearing by Panel, which was mailed on August 28, 1985 and filed August 30, 1985, was timely filed pursuant to FRAP 26(c), Petitioner believes that Certiorari should be granted, pursuant

to Supreme Court Rule 18, so that the Eighth Circuit can provide the Supreme Court with the order or local rule by which the Eighth Circuit has chosen to modify the three (3) additional days permitted by FRAP 26(c), and also to explain to the Court why Petitioner was not provided with a copy of same, if there is one, when Petitioner had requested and received a copy of the local Rules of the United States Court of Appeals for the Eighth Circuit.

B. CERTIORARI SHOULD BE GRANTED TO REVIEW THE EIGHTH CIRCUIT'S ACTIONS TO MAKE A DETERMINATION AS TO WHETHER A FINAL JUDGMENT HAS BEEN RENDERED BY THE EIGHTH CIRCUIT ON PETITIONER'S APPEAL FROM THE JUDGMENT OF THE U.S. DISTRICT COURT BELOW.

1. Petitioner has received no document upon which the signature of any Judge of the Eighth Circuit is

affixed to indicate in any way that a final judgment has been rendered by any Judge, particularly by a three-Judge panel.

2. If Petitioner's Petition for Rehearing by Panel, filed August 30, 1985, is deemed to be timely filed, then Petitioner has received no final judgment on that Petition.

3. Petitioner's Application for Review by the Court, mailed October 18, 1985, has not been officially responded to by the Court.

4. It is Petitioner's position that Petitioner's substantial rights have been adversely affected by the

actions herein referred to[1/] and that no final judgment has been rendered by the Eighth Circuit Court of Appeals on Petitioner's Appeal from the judgment of the U.S. District Court below.

II.

A. CERTIORARI SHOULD BE GRANTED TO REVIEW THE EIGHTH CIRCUIT PRACTICE OF NOT PROVIDING APPELLANTS WITH COPIES OF DOCUMENTS, PURPORTING TO MAKE FINAL DISPOSITION OF APPEALS, WHICH WOULD SHOW BY THE SIGNATURES OF THE JUDGES AFFIXED UPON THEM, THAT THEY DID, IN FACT, MAKE A RULING ON APPELLANTS' APPEALS.

1. Petitioner believes that the future administration of a fair and honest appellate system depends upon

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1/ ....Certiorari will not issue to review a decision of a Circuit Court of Appeals where the matter complained of does not effect the substantial rights of the parties.

Smith vs. Vulcan Iron Works, 165 U.S. 518, 41 L.Ed 810, 17 S.Ct. 407.

the Appellant being provided with documents which clearly show that the Panel saw, and rendered judgment upon, his Appeal[2/]; so that Appellant would know that his Appeal, if denied, at least was denied by Judges whose names were on record; which would provide a clear date from which to start counting the time period within which to Petition the Supreme Court for a Writ of Certiorari; and, above all, which would show that some

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2/ That the future administration of the law might be seriously hindered by the judgment and opinion sought to be reviewed is sufficient reason for granting the writ.

Federal Trade Commission vs. American Tobacco Company

274 U.S. 543, at 544
71 L.Ed 1193
47 S.Ct. 663

Judges had acted on his Appeal, rather than an obscure and un-named Law Clerk, or Clerk of Court, or Deputy Clerk, which issues Petitioner understands are also being raised by others.

III.

A. IN THE EVENT THAT IT IS DEEMED THAT FINAL JUDGMENT BY THE APPELLATE COURT HAS BEEN ENTERED, CERTIORARI SHOULD BE GRANTED BECAUSE THE APPELLATE COURT RENDERED A JUDGMENT THAT DIRECTLY CONFLICTS WITH PRIOR SUPREME COURT PRECEDENT.

1. When his allegations plainly presented a bona fide constitutional claim, without full exploration of the issues involved, [summary judgment] was improper.

Perry vs. Sindermann
408 U.S. 593, at 598
92 S.Ct. 2694
33 L.Ed. 2d 570

2. Fraud vitiates everything.

Boyce vs. Grundy
3 Pet. 210

3. Fraud destroys the validity of everything into which it enters.

Nudd vs. Burrows
91 U.S. 286, at 290

4. Fraud vitiates the most solemn contracts, documents and even judgments.

U.S. vs. Throckmorton
98 U.S. 93, at 95

5. Where rights secured by the Constitution are concerned there can be no legislation or rule making that can abrogate them.

Miranda vs. Arizona
384 U.S. at 494

6. A motion to dismiss cannot be used to deny plaintiff's access to the federal courts.

Haines vs. Kerner
404 U.S. 519, 520, 521 (1972)

Petitioner asserts that the effect of the U.S. District Court's action was for the Court to have treated Defendant's Motion for Summary Judgment as a Motion to Dismiss, which

had previously been submitted by Defendant City but which had not previously been acted upon by the U.S. District Court, thus ignoring the ruling of Haines vs Kerner, and thus to deny Petitioner his right to a jury trial on the merits of his case.

7. Petitioner asserts that the ruling of the U.S. District Court did directly conflict with the Rules of Civil Procedure, Rule 56(e), Notes of Advisory Committee on Rules, 1963 Amendment, last paragraph,[3/] thereby conflicting directly with U.S. Supreme Court precedent.

3/ Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.

B. IN THE EVENT THAT IT IS DEEMED THAT FINAL JUDGMENT BY THE APPELLATE COURT HAS BEEN ENTERED, CERTIORARI SHOULD BE GRANTED BECAUSE THE APPELLATE COURT RENDERED A JUDGMENT THAT DIRECTLY CONFLICTS WITH NUMEROUS DECISIONS OF THE COURTS OF APPEALS.

1. Whether the alleged fraud..... was concealed or was of such a nature as to conceal itself, thus tolling the statute of limitations until the minority shareholders had obtained knowledge of the fraud or, in the exercise of due care, should have obtained that knowledge, whether the knowledge could have been reasonably acquired three years prior to the filing of the complaint, and whether a fiduciary relationship existed between the parties so as to have had the effect of lessening the duty of inquiry on the part of the minority shareholders were questions of fact precluding summary judgment.

Sperry vs. Barggren
523 F. 2d 708 (C.A. 7th)
at 709

2. A material fact issue existed whether defendant deliberately and fraudulently concealed an allegedly libelous report from plaintiff, thereby tolling the Kentucky one-year limitations period, precluding summary judgment for defendant.

Lashee vs. Sumner at 108
570 F. 2d 107 (C.A. 6th, 1978)

3. In cases raising federal constitutional claims, a court must rigorously insure against granting summary judgment when any doubt exists concerning disputed material facts.

Boulware vs. Battaglia
344 F. Supp 889, at 890
affirmed C.A. 3d, 1973,
478 F. 2d 1398

IV.

A. CERTIORARI SHOULD BE GRANTED BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTS WHICH PRECLUDE SUMMARY JUDGMENT IN THIS CIVIL RIGHTS ACTION.

1. ....material issues of fact regarding the voluntariness of plaintiff's initial entry into the hospital and whether the hospital correctly relied

on an improper court order in detaining plaintiff precluded the entry of summary judgment for plaintiff prior to trial.

Rawls vs. Daughters of Charity of St. Vincent De Paul, Inc.
491 F. 2d 141 (C.A. 5th, 1974)
certiorari denied at 142
95 S.Ct. 513
419 U.S. 1032
42 L. Ed. 2d 307

2. Petitioner would relate the question of whether Defendant City incorrectly ignored a proper Temporary Restraining Order to this case, as constituting a material issue of fact, precluding the entry of summary judgment.

3. ....that true reasons for her dismissal were concealed from her until a later time, raising question of fraudulent concealment doctrine and, given this posture of case, claim would not be dismissed at this time as time barred.

Boyce vs. School Dist. of Phila.
447 F. Supp. 357(D.C.Pa.1978)
at 358

4. Petitioner asserts that the question of whether the alleged fraudulent absence of certain documents in the record of condemnation proceedings on the part of Defendant City was of such a nature as to conceal itself, thus tolling the statute of limitations was a question of fact precluding summary judgment.

5. Even if the securities fraud action including a claim for breach of fiduciary duties was governed by the three-year fraud statute of limitations, rather than the five-year statute of limitations, the issue of when plaintiffs discovered the allegedly fraudulent transfer that was the breach of fiduciary duty was a genuine issue of fact, precluding summary judgment.

Laymon vs. McComb
524 F. Supp. 1091
(D.C.Colo. 1981)

6. Petitioner asserts that the alleged fraud and fraudulent concealment of Petitioner's Complaint was of such a nature as to conceal itself, thus tolling the statute of limitations, which statute of limitations the U.S. District Court stated as the basis for claiming not to have jurisdiction.4/

7. Petitioner asserts that whether the knowledge of the alleged fraud and fraudulent concealment could have been reasonably acquired sooner than it was, and the extent to which the fiduciary relationship between Defendant City and Petitioner

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4/ See Sperry vs. Barggren 523 F. 2d 708 (C.A.7th) supra.

would have the effect of lessening the duty of inquiry on the part of Petitioner were questions of fact precluding summary judgment.[5/]

8. Petitioner asserts that a material fact issue exists whether Defendant City deliberately and fraudulently concealed the existence of allegedly falsely, illegally and fraudulently prepared and backdated records of the alleged condemnation proceedings, thereby tolling the statute of limitations.[6/]

5/ See Sperry vs Barggren 523 F. 2d 708 (C.A.7th) supra.

6/ See Lashee vs. Sumner 570 F. 2d 107 (C.A. 6th, 1978) supra.

B. CERTIORARI SHOULD BE GRANTED BECAUSE DEFENDANT CITY IGNORED A VALID TEMPORARY RESTRAINING ORDER, WHICH FACT THE U.S. DISTRICT COURT IGNORED, THAT THEREFORE THERE WAS NO "VALID GOVERNMENTAL ACTION" WHICH THE U.S. DISTRICT COURT ASSUMED TO EXIST, AS A BASIS FOR ITS RULING THAT NO "PROTECTED PROPERTY RIGHT" HAS BEEN INFRINGED.7/

1. Petitioner asserts that there was a valid Temporary Restraining Order in effect, which was violated by Defendant City on June 10, 1969. Petitioner further asserts that all valid condemnation proceedings ceased upon the issuance of and the service upon Defendant City of a Temporary Restraining Order, dated and served

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7/ See p. 2 of Ruling and Order Granting Defendant's Motion for Summary Judgment. (Appendix p. A-5)

upon Defendant City on June 9, 1969.

(Cause No. 51298, District Court, Scott County, Iowa).[8/]

2. In injunction proceedings the order of a court having jurisdiction of the matter and of the parties, even if erroneous, is not void, and until reversed must be obeyed.

State vs. Baldwin
10 N.W. 645, at 647
57 Iowa 266 (1881)

8/ See Plaintiff's Exhibit 4, included with Plaintiff's Affidavit of Material Facts in Support of Resistance to Defendant's Motion for Summary Judgment, filed July 27, 1984, which Exhibit 4 includes: Notice to Defendant of Order to Show Cause, filed June 9, 1969; Order for Hearing on Temporary Injunction, filed June 9, 1969; Sheriff's Return on Order served June 9, 1969, on Allyn Weise, City Clerk, filed June 11, 1969; all in connection with Cause No. 51298. (Appendix A-26 through A-34)

C. CERTIORARI SHOULD BE GRANTED BECAUSE JUDGE W. C. STUART HAD PROPERLY STATED THE REASONS WHY THE PRINCIPLE OF "RES JUDICATA" SHOULD NOT APPLY TO SIMILAR CIVIL RIGHTS SUITS, IN HIS OWN COURT ORDER, ENTERED JULY 6, 1981,[9/] WHICH REASONS HE IGNORED IN HIS RULING AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, ENTERED APRIL 12, 1985, (MOSE KOREY VS. CITY OF DAVENPORT, IOWA, CIVIL NO. 83-174-D-1).

1. Petitioner asserts that Judge W. C. Stuart properly recognized, on page 5 of his Order, that:

> However, the constitutional questions raised in Division IV of the Shoemaker's state law complaint were not properly before the state district court, and thus could not have been actually or necessarily disposed of in

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9/ United States District Court for the Southern District of Iowa, Shoemaker vs. City of Muscatine, Iowa, CIVIL NO. 78-112-D and Pape vs. City of Muscatine, Iowa, CIVIL NO. 78-113-D (See Appendix pp. A-58, A-59)

> that court.....the state court's subject matter jurisdiction was restricted pursuant to Section 472.21 of the Code to a determination of the propriety of the amount of damages assessed by the condemnation commission..... Therefore, since the claims pending before this Court could under no circumstances have been entertained by the state district court, the principle of res judicata does not foreclose plaintiff's right to pursue such claims herein.

2. Petitioner further asserts that Judge W.C. Stuart reversed his position and ruled the opposite in Petitioner's case, whereas the same principle applies.

D. CERTIORARI SHOULD BE GRANTED BECAUSE JUDGE W.C. STUART REVERSED HIS POSITION GIVEN IN HIS ORDER, ENTERED JULY 6, 1981,[10/] RELATIVE TO MOTION FOR SUMMARY JUDGMENT.

10/ (See 9/ supra)
(See Appendix pp. A-48 thru A-50)

1. Petitioner further asserts that in the same Order, entered on July 6, 1981, Judge W.C. Stuart properly stated the following, on p.2, Re: Motion for Summary Judgment):

> The Court must assess the facts in the light most favorable to the nonmovant and the latter must be afforded the benefit of all favorable inferences which may be derived from the underlying facts as revealed in the pleadings, depositions and affidavits filed therein.

McClain vs. Meier
612 F. 2d 349, 356
(8th Cir., 1979)
(See Appendix p. A-50)

CONCLUSION

Certiorari should be granted to resolve the questions left unanswered by the Actions of the Clerk of Court of the Eighth Circuit Court of Appeals. The opinion of the U.S. District Court for the Southern District of Iowa is in conflict with Supreme Court precedent, other Circuit Court of Appeals precedent and in conflict, even, with its own previous decision.

Respectfully submitted,

Mose Korey

MOSE KOREY, Pro Se
3026 Belle Avenue
Davenport, Iowa 52803

Phone: (319) 359-0272

STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

VERIFICATION

I, MOSE KOREY, being first duly sworn, state and depose that I have read the foregoing PETITION FOR WRIT OF CERTIORARI, that I am familiar with it's content, and that I understand it and swear that everything therein is true and correct to the best of my information, personal knowledge and belief.

Mose Korey
MOSE KOREY

Subscribed and sworn to before me on this 4th day of December, 1985.

Dawn L. Helfrich
NOTARY PUBLIC

APPENDIX

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Letter, Dr. John F. Collins, dated April 29, 1985	A-1
Ruling and Order Granting Defendant's Motion for Summary Judgment, entered April 12, 1985	A-2 , A-3 A-4 , A-5 A-6 , A-7 A-8 , A-9 A-10, A-11
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Letter dated October 3, 1985, transmitting mandate of the Court	A-21
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From Plaintiff's Exhibit 4, as filed with: Plaintiff's Affidavit of Material Facts in Support of Resistance to Defendant's Motion for Summary Judgment (CIVIL NO. 83-174-D-1)	

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STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

CERTIFICATE OF SERVICE

This is to certify that the undersigned did on this 5th day of December, 1985, deposit in the U.S. Mail, postage prepaid for delivery by first class mail to the following addresses:

1. Mr. Alexander L. Stevas, Clerk
United States Supreme
Court Building
1 First Street, N.E.
Washington, D.C. 20543

forty-three (43) copies of:

PETITION FOR WRIT OF CERTIORARI
ENTRY OF APPEARANCE

for filing, of which three (3) copies are to be returned to Petitioner after filing.

2. Patricia Rhodes Cepican
3432 Jersey Ridge Road
Davenport, Iowa 52807

three (3) copies of same document.

I further certify that, in compliance with Supreme Court Rule 28.5(c), all parties required to be served have been served.

Mose Korey

MOSE KOREY

Subscribed and sworn
to before me on this
4th day of December,
1985.

Dawn L. Helfrich

NOTARY PUBLIC

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS.

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ENTRY OF APPEARANCE

COMES NOW, MOSE KOREY, and hereby enters his appearance on behalf of himself, representing himself, Pro Se, as Petitioner in the above captioned case.

Mose Korey

MOSE KOREY
3026 Belle Avenue
Davenport, Iowa 52803